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IN THE

# Supreme Court of the United States

October Term, 1944.

No. 1004

FRANKLIN PEANUT COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUPPORTING BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

# INDEX.

## Subject Index.


Page

Petition for writ of certiorari

Summary statement of the matter involved..... 2
Questions presented ..... 4
Reasons relied on for the allowance of the writ.... 4
Prayer for writ ..... 5

Brief in support of petition:

Opinions below ..... 7
Jurisdiction ..... 7
Statement of the case (see summary statement of the matter involved ..... 8
Statute involved ..... 8
Specification of errors..... 10
Summary of argument ..... 11
Argument ..... 11
Conclusion ..... 19


## LIST OF AUTHORITIES CITED.

### Cases.


Anniston Mfg. Co. v. Davis, 301 U. S. 337.....4, 14
Arkwright Mills v. Commissioner, 127 F. (2d) 465....14, 18
Cudahy Packing Co. v. U. S., 126 F. (2d) 429..... 12
Dobson v. Commissioner of Internal Revenue, 320 U. S. 489.....11, 19
Republic Cotton Mills v. Commissioner, (CCA-4, 1-31-45; 1945 Prentice Hall Federal Tax Service para. 72362) ..... 15
Webre Steib Company, Ltd. v. Commissioner of Internal Revenue, — U. S. — (2-12-45; 13 LW 4199)..5, 16


### Statutes.


Sec. 510 of the Revenue of the 1942..... 2
Sec. 240 (a) of the Judicial Code, (ch. 229 43 Stat. 936) 8
Sec. 902 and 907 of the Revenue Act of 1936..... 8


### Senate Report.


Senate Report No. 2156 of the Committee on Finance.. 13

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your Petitioner, Franklin Peanut Company, a partnership, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fourth Circuit in the foregoing cause, wherein said Circuit Court of Appeals affirmed a decision of the Tax Court which denied petitioner a recovery of processing taxes theretofore paid.

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner herein, sometimes designated the taxpayer, was engaged in the business of cleaning, grading and shelling peanuts, and as such, was a processor within the intent and meaning of the Agriculture Adjustment Act, during the taxing period November 1, 1934 to April 30, 1935. While the effective date of the processing tax of 1¢ a pound on peanuts was October 1, 1934, petitioner did no processing until November 1934, and did not incur a tax liability until that time. Processing taxes were paid by petitioner for the period November 1, 1934 to April 30, 1935.

When the processing tax was declared unconstitutional, a timely claim for refund was duly filed by the taxpayer, and upon its rejection in full by respondent, a petition for review of said disallowance was filed with the Processing Tax Board of Review. Hearings were had and evidence was taken before said Board which prepared Recommended Findings of Fact and Decision adverse to petitioner, but before said Findings and said Decision were formally adopted or promulgated by the Board, said body was abolished by Sec. 510 of the Revenue Act of 1942, and its functions transferred to the Tax Court.

The Tax Court, without material changes, adopted the aforesaid Recommended Findings and Decision (R. 247) and entered judgment against the taxpayer. This judgment has been affirmed by the Circuit Court of Appeals, Fourth Circuit, (R. 274-281).

In the disposition of this case, the Tax Court with the subsequent approval of the Circuit Court of Appeals, fell into error, as a matter of law, in ignoring the testimony of petitioner's three economic and statistical experts, in excluding certain expert testimony, in disregarding other evidence as to economic factors, and *in failing to make any findings whatsoever with respect thereto.* Petitioner's evidence dealing with said matters was not controverted and

the respondent failed to produce even one witness in rebuttal.

By subpoena petitioner called as witnesses two economic and statistical experts employed by the Department of Agriculture for the purpose of having them testify regarding taxpayer's alleged shifting to vendees of the burden of the processing tax. Each such witness was eminently qualified, having devoted many years to the study of the economic aspects of the peanut industry. In addition, petitioner produced as a witness, for the purpose of having him testify upon the same subject, a member of the largest exclusively peanut brokerage firm in the United States.

Mr. Gustave Burmeister, one of the economists of the Agricultural Department, testified that factors other than the processing tax were responsible for the margins during the tax year, and that said tax was not an element in determining sale prices. (R. 197). The other specialist from the Department, Mr. Harold J. Clay, who was admitted by government counsel to be an expert (R. 117) testified that the processing tax added no more than 4/10ths of a cent to the average price of peanuts during the period, and hence that said 4/10ths of a cent a pound was the maximum amount of tax which petitioner could have shifted to others, (R. 156); but the presiding member of the Board of Review actually ruled out this testimony and refused to consider same in the case (R. 153-154). The third witness, Mr. Robert J. Speer, was of the opinion that petitioner might have shifted as much as 50% of the tax in controversy.

Also, we search the record in vain for any Findings with respect to other important economic factors—there is substantial evidence in the record regarding them—such as the large deficiency during the tax period in the available supply of animal fats and vegetable oils; the peanut diversion program, with its subsidized payments for peanuts diverted to oil; the increased consumer demand, brought on in part by governmental expenditures for recovery and relief and by generally increased purchasing power of consumers.

The statutory marginal presumption in this case is adverse to petitioner, but upon the introduction by petitioner of other evidence, hereinabove outlined, said presumption became inoperative. Said other evidence has obviously not been considered by the Tax Court since no Findings whatsoever have been made with respect thereto.

## QUESTIONS PRESENTED.

1. Whether petitioner is entitled to a refund of unconstitutional processing taxes heretofore paid, upon the basis of the showing made before the Tax Court.

2. Whether, in reaching a conclusion with respect to question 1 supra, it was proper or permissible for the Tax Court to exclude certain expert testimony and to fail utterly to make Findings with regard to the only testimony upon which petitioner could hope to prevail in the litigation, it being admitted that the margin computation was adverse to the taxpayer.

3. Whether it was proper for the Circuit Court of Appeals to indulge the presumption that the Tax Court had considered certain evidence as to the economic burden when it is clear that no Findings whatsoever had been made with respect thereto.

4. Whether, the statutory presumption based on margin computations having become inoperative, there remained in the case substantial evidence which, when properly weighed, could support the conclusion that petitioner absorbed none of the tax.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals, Fourth Circuit, has made a decision in the case at bar which is in conflict with a decision of this Honorable Court, to wit, *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

In the case last cited it is apparent that the Tax Court, just as other administrative bodies, must, as an indispensable requirement in its procedure, base its decision upon its Findings and that its Findings must be based upon the evidence. The Supreme Court said (p. 356):

> "The board which makes its Findings and renders its decision *must* consider the evidence and base its Findings and decision upon it." (Italics ours).

In failing and refusing to make any Findings of Fact covering the economic factors and the opinions of skilled economists with respect to the incidence of the tax, the Tax Court is flying in the face of the quoted language of the United States Supreme Court. This alone is reversible error.

2. The statutory presumption against the taxpayer, based on margin computations, having become inoperative under *Webre Steib Company Ltd.* v. *Commissioner of Internal Revenue*, — *U. S.* — (2-12-45; 13 LW 4199), the principal ground upon which the Circuit Court of Appeals based its decision no longer exists.

The case at bar was decided prior to *Webre Steib* v. *Commissioner of Internal Revenue*, supra. It is clear under said decision of the Supreme Court that the presumption against petitioner became inoperative upon the introduction by the taxpayer of other evidence. Said other evidence was never given the weight to which it was entitled because the lower Court considered the adverse presumption as continuing. Had it been given its proper weight and if that weight had been expressed in Findings of Fact, the result would have been favorable to the taxpayer.

## PRAYER.

For the foregoing reasons, which are developed in some detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Fourth Circuit to the end that the above entitled cause may be re-

viewed and determined by this Court; that the final order of said Circuit Court of Appeals be reversed and that petitioner be granted such other and further relief as is proper.

Respectfully submitted,

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Dated: March, 1945.